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FAWZIAH HOLDINGS SDN BHD

v.

METRAMAC CORPORATION SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
JAMES FOONG JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: W-02-1009-2003]

C

29 OCTOBER 2005
(15 DECEMBER 2005)

CIVIL PROCEDURE: *Jurisdiction - Original jurisdiction - Court of Appeal - Application by plaintiff seeking order of court restraining*

D

defendant from dissipating assets - Whether Court of Appeal entitled to exercise original jurisdiction under s. 44 Courts of Judicature Act 1964 - Whether order would result in undue preference to plaintiff - Whether plaintiff required interim protection until further order - Courts of Judicature Act 1964, s. 44

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The applicant/plaintiff brought an action for moneys allegedly owed to it by the respondent/defendant under the terms of one of a series of interlocking agreements. The plaintiff's claim was in two parts, first, for a liquidated sum of RM65 million and, second, for

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an unliquidated sum. The trial judge found the defendant liable but declined to award the sum of RM65 million. He instead directed damages to be assessed and also denied the plaintiff the second claim. The plaintiff appealed against both orders whilst the defendant appealed against the finding on liability. These appeals

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were heard by a differently constituted Bench, which reserved judgment after hearing the arguments. The plaintiff had, in the meantime, filed an application seeking an order of this court that the defendant be required to set aside a sum of not less that RM100 million to meet its judgment. The plaintiff did so because

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it feared that if it succeeded in the appeal, it would be left holding a paper judgment. This application raised an important point of law, which had to do with the power of this court to protect the rights of a plaintiff who has a judgment in his favour to ensure that his judgment is not rendered useless pending either an appeal

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or pending decision on an appeal.

Held (ordering that the defendant be restrained from disposing of or dissipating its assets up to RM100 million)
Per Gopal Sri Ram JCA:

[1] This court was exercising its original jurisdiction under s. 44 of the Courts of Judicature Act 1964 ('CJA'). It is important to notice that s. 44(1) CJA uses the words "in any proceeding". It does not say "in any appeal". Parliament has gone on to clarify the position in the second subsection which deems an application under s. 44 CJA to be a proceeding. And s. 3 CJA defines "proceeding" to mean any proceeding whatsoever of a civil or criminal nature and "includes an application at any stage of a proceeding". So, when this court makes an order under s. 44 CJA, it does not deal with the appeal proper at all. Hence, it is an original jurisdiction, albeit a very limited one. In the instant case, the appeals by both sides had been heard and judgment reserved. All that remained was the giving of the decision and reasons for it. There was, therefore, no appeal pending before this court. This court was asked to act under s. 44 CJA to grant interim protection between now and the date of the decision. That, with respect, was an invitation to exercise original jurisdiction and this court could exercise it because of s. 44 CJA. (pp 203 G - H & 204 A - F)

[2] The relationship between the plaintiff and defendant was that of judgment creditor and debtor. Indeed, the plaintiff was an unsecured creditor. The order sought would have the effect of creating a special fund in the plaintiff's favour to meet his unsecured debt. This would be an undue preference in the plaintiff's favour and the order would accordingly be void against the defendant's other creditors in the event of a winding-up. For no unsecured creditor may steal a march upon his fellow unsecured creditors to get his hands on the debtor's assets by having a special fund created in his favour out of his debtor's assets. So, s. 44 CJA, wide though it may be, does not authorise this court to make the order asked for by the plaintiff on its motion. (pp 206 E - H & 207 A - C)

[3] That said, it was clear from the affidavits filed on the motion before this court, without prejudging the merits of the appeal, that the facts cried out for interim protection of the plaintiff's accrued rights. Serious allegations of fact had been made in the plaintiff's affidavit in support of its motion. The defendant had merely denied some of these allegations in general terms but had not been forthcoming with facts that were peculiarly within its knowledge. In short, there had been a singular lack of candour. Reading the affidavit left one with the clear impression that the plaintiff required interim protection until this court handed down its judgment. That being the case, this court granted an injunction on the usual terms restraining the defendant and/or its servants or agents from dealing with or disposing of its assets, including any monies it may receive hereafter, up to a limit of RM100 million until further order. This order was merely in the form of a post judgment Mareva injunction that provided the plaintiff the much-needed interim protection until further order. Section 44 CJA empowered this court to make such an order since the interests of justice demanded it. (p 208 F - I)

Per James Foong JCA (concurring):

[1] The Federal Court's decision in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* and *Capital Insurance Bhd v. Aishah Abdul Manap & Anor* declaring that the Court of Appeal has no original jurisdiction, save and except, in the limited scope granted under s. 44 CJA to deal with "any proceedings pending before the Court of Appeal", is binding on this court. The dissenting view of Chong Siew Fai (CJ Sabah & Sarawak) in *Lam Kong (supra)* over this point could not be accepted as the correct state of law over the majority judgment of the two other Federal Court judges who sat on that case. In this instant case, however, since there was a pending proceeding before this court where the decision in the appeal proper had yet to be delivered, though the appeal was argued, this court was clothed with jurisdiction to hear this notice of motion brought by the appellant/plaintiff for its consideration. (p 209 E - G)

[Order accordingly; defendant's application for stay of order refused.]

Bahasa Malaysia *translation of headnotes*

Pemohon/plaintif memulakan tindakan bagi mendapat kembali hutang yang dikatakan terhutang kepadanya oleh responden/defendan di bawah terma beberapa perjanjian bercantum. Tuntutan plaintif adalah dalam dua bahagian, iaitu, pertama untuk jumlah tertentu sebanyak RM65 juta dan kedua untuk satu jumlah yang tidak ditentukan. Hakim bicara mendapati defendan bertanggungan tetapi enggan membenarkan award bagi jumlah RM65 juta. Beliau sebaliknya mengarahkan supaya gantirugi ditaksir dan tidak membenarkan tuntutan plaintif yang kedua. Plaintif merayu terhadap kedua-dua perintah, sementara defendan merayu terhadap dapatan liabiliti. Rayuan-rayuan kemudian didengar oleh sidang panel yang berbeza, yang menangguhkan keputusan setelah mendengar hujah-hujah. Sementara itu, plaintif memfailkan permohonan untuk mendapatkan perintah dari mahkamah ini bagi memaksa defendan supaya menyampingkan sejumlah tidak kurang RM100 juta sebagai pematuhan kepada penghakiman. Plaintif melakukan ini kerana bimbang akan memperoleh penghakiman atas kertas semata-mata, jikapun berjaya dalam rayuannya. Permohonan ini membangkitkan persoalan undang-undang yang penting, iaitu bersangkutan dengan kuasa mahkamah ini untuk melindungi hak seorang plaintif yang telah mendapat penghakiman dengan mempastikan bahawa penghakimannya itu tidak menjadi sia-sia sementara menunggu rayuan atau keputusan sesuatu rayuan.

Diputuskan (memerintah defendan supaya tidak melupus atau menghilangkan asetnya setakat RM100 juta)
Oleh Gopal Sri Ram HMR:

[1] Mahkamah ini melaksanakan bidang kuasa asalnya di bawah s. 44 Akta Mahkamah Kehakiman 1964 ('AMK'). Perlu diperhatikan bahawa s. 44(1) AMK menggunakan perkataan "dalam mana-mana prosiding". Ia tidak menyatakan "dalam mana-mana rayuan". Parlimen kemudian menjelaskan kedudukan perkara di subseksyen kedua yang menganggap permohonan di bawah s. 44 AMK sebagai satu prosiding. Dan s. 3 AMK mentakrif "prosiding" sebagai bermaksud apa jua prosiding sama ada yang bersifat sivil atau jenayah dan "termasuk suatu permohonan di mana-mana peringkat prosiding". Oleh itu, apabila mahkamah ini membuat perintah di bawah s. 44 AMK, ia langsung tidak menyentuh rayuan sebenar. Ianya, dengan itu, merupakan bidang kuasa asal,

walaupun terhad. Dalam kes semasa, rayuan oleh kedua-dua pihak telah didengar dan keputusan telah ditangguh. Maka yang tinggal hanyalah memberi keputusan serta alasan-alasannya. Dengan demikian, tiada sebarang rayuan di hadapan mahkamah ini. Mahkamah ini diminta bertindak di bawah s. 44 AMK untuk memberi perlindungan injunksi interim dari sekarang hingga ke tarikh keputusan dibuat. Itu, dengan hormat, adalah jemputan untuk melaksanakan bidang kuasa asal dan mahkamah ini boleh melakukannya bersandarkan kepada s. 44 AMK.

[2] Hubungan antara plaintif dan defendan adalah sebagai pemiutang dan penghutang penghakiman. Plaintif, malah, adalah pemiutang tak bercagar. Perintah yang dipohon, secara berkesannya, akan mewujudkan suatu dana khas bagi manfaat plaintif untuk memenuhi hutang tak bercagarnya. Ia adalah suatu keutamaan tak wajar kepada plaintif dan dengan itu perintah akan menjadi terbatal terhadap pemiutang-pemiutang defendan yang lain jika berlaku penggulungan. Seseorang pemiutang tak bercagar tidak boleh mengambil aset penghutang dengan membelakangi pemiutang-pemiutang tak bercagar yang lain dengan cara mewujudkan dana khas bagi dirinya atas aset-aset tersebut. Oleh yang demikian, s. 44 AMK, walaupun kelihatan mempunyai liputan yang luas, tidak mengizinkan mahkamah ini untuk membuat perintah yang dipohon oleh plaintif di atas usulnya.

[3] Di samping itu, adalah jelas, dari afidavit-afidavit yang difailkan di atas usul di hadapan mahkamah ini, tanpa menyentuhi merit rayuan, bahawa fakta-fakta memang mewajarkan pemberian injunksi interim bagi melindungi hak-hak yang terakru kepada plaintif. Pengataan-pengataan fakta yang serius telah dibuat oleh plaintif dalam afidavit yang menyokong usulnya. Pengataan-pengataan ini, bagaimanapun, hanya disangkal secara umum oleh defendan selain gagal membangkitkan fakta-fakta yang khusus berada dalam pengetahuannya. Pendek kata, ketulusan jelas tidak wujud. Membaca afidavit-afidavit akan memberi keyakinan bahawa plaintif memang memerlukan perlindungan interim sehingga mahkamah ini membuat keputusannya. Dengan demikian, mahkamah membenarkan perintah injunksi atas terma-terma biasa bagi menghalang defendan dan/atau pekerja-pekerjanya atau agen-agennya dari

mengendali atau melupuskan aset-aset, termasuk wang yang mungkin diperolehinya selepas ini, hingga ke tahap RM100 juta sehinggalah perintah selanjutnya. Perintah ini adalah dalam bentuk injunksi Mareva pasca penghakiman yang memberikan plaintif perlindungan interim yang amat diperlukannya sehingga perintah selanjutnya. Seksyen 44 AMK membolehkan mahkamah membuat perintah sedemikian kerana ia diwajarkan oleh pertimbangan keadilan.

Oleh James Foong HMR (menyetujui):

[1] Keputusan Mahkamah Persekutuan di dalam *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* dan *Capital Insurance Bhd v. Aishah Abdul Manap & Anor* yang mengisytiharkan bahawa Mahkamah Rayuan tidak mempunyai bidang kuasa asal, kecuali dalam skop terhad yang diberi oleh s. 44 AMK untuk menangani "mana-mana prosiding yang belum diputuskan di hadapan Mahkamah Rayuan", mengikat mahkamah ini. Pandangan menentang Chong Siew Fai (HB Sabah & Sarawak) dalam *Lam Kong (supra)* atas persoalan ini tidak boleh diterima sebagai undang-undang yang terpakai mengatasi keputusan majoriti dua hakim Mahkamah Persekutuan yang lain yang bersidang atas kes itu. Bagaimanapun, dalam kes semasa, oleh kerana terdapat prosiding yang belum diputuskan di hadapan mahkamah ini di mana keputusan dalam rayuan sebenar masih belum diberi, walaupun hujah-hujah sudah dibuat, mahkamah ini mempunyai bidang kuasa untuk mendengar notis usul yang dibawa oleh perayu/plaintif untuk pertimbangannya.

[Perintah sewajarnya. Permohonan defendan untuk penggantungan perintah ditolak]

Case(s) referred to:

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 FC ***(refd)***

Banque Belge v. Hambrouck [1921] 1 KB 321 ***(refd)***

Capital Insurance Bhd v. Aishah Abdul Manap & Anor [2000] 4 CLJ 1 FC ***(refd)***

Foskett v. McKeown [2000] 3 All ER 97 ***(refd)***

Lam Kong Co Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769 FC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

Polly Peck International Plc v. Nadir (No 2) [1992] 2 Lloyd's Rep 238 ***(dist)***

A *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2002] 4 CLJ 27 CA* ***(refd)***
Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260 ***(refd)***

Legislation referred to:
B Courts of Judicature Act 1964, ss. 3, 44(1)
Rules of the High Court 1980, O. 29 r. 2

For the appellant - Dr Cyrus Das (Benjamin Dawson with him); M/s Noraisyah & Co
C *For the respondent - Muhammad Shafee Abdullah (Kaushalya Rajathurai with him); M/s Shahrizat Rashid & Lee*

[Appeal from High Court, Kuala Lumpur; Suit No: D5-22-110-1995]

Reported by Suresh Nathan

D

JUDGMENT

Gopal Sri Ram JCA:
E We heard this motion on 24 October 2005 and reserved our decision on it to the following day. We did not grant the orders sought. But we granted an injunction on the usual terms restraining the respondent (whom I shall refer to as the defendant) and/or its servants or agents or howsoever otherwise from dealing
F with or disposing of its assets, including any monies it may receive hereafter, up to a limit of RM100 million until further order. After we had made the order, learned counsel for the defendant sought a stay of our order because he wishes to test the correctness of our decision before the Federal Court.

G We are here exercising our original jurisdiction under s. 44 of the Courts of Judicature Act 1964 ("CJA"). See, *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2002] 4 CLJ 27. I am aware that in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 Dzaiddin FCJ remarked by way of obiter that: "It is trite
H that the Court of Appeal today no longer has any original jurisdiction". That, with respect, is too wide and is an incorrect observation. It overlooks the actual wording of s. 44 which reads:

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(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

It is important to notice that s. 44(1) uses the words "in any proceeding". It does not say "in any appeal". Parliament has gone on to clarify the position in the second subsection which deems an application under s. 44(1) to be a proceeding. And s. 3 CJA defines "proceeding" to mean any proceeding whatsoever of a civil or criminal nature and "includes an application at any stage of a proceeding". So, when this court makes an order under CJA s. 44(1) it does not deal with the appeal proper at all. Hence it is a original jurisdiction, albeit a very limited one.

Take this very case. The appeals by both sides have been heard and judgment reserved. All that remains is the giving of the decision and reasons for it. There is therefore no appeal pending before this court. We are asked to act under s. 44 to grant interim protection between now and the date on which our decision will come. That, with respect is an invitation to exercise original jurisdiction and we can exercise it because of s. 44.

Since we are not exercising appellate jurisdiction in respect of a matter that originated in the High Court, an appeal to the Federal Court is not available. Similarly, there is no appeal from a decision of this Court refusing leave to appeal. See, *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485. It may have been different if we had been exercising our appellate jurisdiction in respect of a matter that originated in the High Court. In that event an appeal to the Federal Court would, in my respectful view, be competent despite the decisions in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769 and *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1. This is because doubt has been cast over these cases by the majority

judgments in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645. Also, because, in my respectful view, both *Lam Kong* and *Capital Insurance* were wrongly decided and the dissent of Chong Siew Fai CJ (Sabah & Sarawak) in *Lam Kong* is correct.

So, in the ordinary way, in a case of this kind we would not write a judgment unless the Federal Court requires it for purposes of deciding whether to grant leave. But this application raises an important point of law. It has to do with the power of this court to protect the rights of a plaintiff who has a judgment in his favour to ensure that his judgment is not rendered useless pending either an appeal or pending decision on an appeal. So far as I am aware, that point has not been decided in any other case. A judgment is accordingly called for.

The applicant – and I shall refer to it as the plaintiff – brought an action for monies allegedly owed it by the defendant under the terms of one of a series of interlocking agreements. The plaintiff's claim was in two parts. First, for a liquidated sum of RM65 million and, second, for an unliquidated sum. The trial judge found the defendant liable. But he declined to award the sum of RM65 million. Instead he directed damages to be assessed. He also denied the plaintiff the second claim. The plaintiff appealed against both orders whilst the defendant appealed against the finding of liability. These appeals were heard a few weeks ago by a differently constituted Bench of which my learned brother Zulkefli Makinudin JCA and I were also members. After hearing argument we reserved judgment. The estimated value of the plaintiff's claims under both heads is in the region of RM145 million.

The plaintiff had in the meantime filed an application asking for certain orders, which I will briefly refer to in a moment. It did so because it feared that if it succeeded in the appeal, it will be left holding a paper judgment. The plaintiff says that its fear is well grounded. Because, the defendant is about to undergo a restructuring exercise under the terms of which its sole and very valuable asset, the right to collect toll, will be charged to lenders who are financing the restructure. A substantial portion of the monies obtained from the financing will go to pay dividends to the defendant's shareholders. Once that happens, the plaintiff will, says its counsel be left holding on to a worthless piece of paper. I must now say a word about the orders asked for by the plaintiff in its motion.

In essence, what the plaintiff wanted was for this court to "earmark" funds that will be coming into the defendant's hands. In short, the defendant was to be required to set aside a sum of not less than RM100 million to meet its judgment. Now, can this court grant such an order? Learned counsel for the plaintiff submits that it can. In support he relies on CJA s. 44 and the decision of the English Court of Appeal in *Polly Peck International Plc v. Nadir (No. 2)* [1992] 2 Lloyd's Rep. 238.

Counsel for the plaintiff submits that s. 44 is widely drafted. True enough. He submits that it enables us to make any form of interim preservation order that will prevent prejudice to his client's claim. Also true. But the power it confers upon us must be exercised in accordance with the general law. In the present instance if we were to direct the defendant to set aside or to earmark a sum of RM100 million, that would be an ineffective order. I will explain why.

The relationship between the plaintiff and defendant is that of judgment creditor and debtor. Indeed, the plaintiff is an unsecured creditor. The order sought will have the effect of creating a special fund in the plaintiff's favour to meet his unsecured debt. This will be an undue preference in the plaintiff's favour and the order will accordingly be void against the defendant's other creditors in the event of a winding up. For no unsecured creditor may seek to steal a march upon his fellow unsecured creditors to get his hands on the debtor's assets by having a special fund created in his favour out of his debtor's assets. He must, like all his fellow unsecured creditors, join the queue and prove his debt in the debtor's insolvency. Any fund specially created will have to be brought into the debtor's general estate. To this learned counsel answers that there is in fact no insolvency as yet and that the defendant is in fact solvent and so no question of preference can arise. But that is not the test for undue preference. The question that is to be is asked is a hypothetical one. What will happen to the fund which the plaintiff now wants to have set up in its favour if the defendant were to be wound up?

As for authority to support the view I have expressed, I need go no further than *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 260 where, when responding to a similar invitation as here, Raja Azlan Shah CJ (Malaya) said that:

> the result would be that a plaintiff could require a defendant to set up a special fund to meet a claim not yet proved, or again the effect might be to give the particular plaintiff preference over the other creditors. We would in this connection also refer to the judgment of this court in *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 2 MLJ 240, 244 (at p. 244) and are accordingly unable to take the view that it would be proper in the circumstances to make the order sought by the appellant against the company.

So, s. 44, wide though it may be, does not authorise this court to make the order asked for by the plaintiff on its motion. It therefore does not assist the plaintiff to obtain the order sought for on the motion.

I now come to *Polly Peck International Plc v. Nadir* upon which learned counsel places much reliance. That case concerned a director who had, in alleged breach of his fiduciary duties, siphoned out money belonging to the company. Some of these funds, amounting to £8.9 million, found their way into the hands of the Central Bank of the Turkish Republic of Northern Cyprus. The company commenced an action in which it sought to trace the funds diverted by the director. It applied for a Mareva injunction against the Central Bank which was granted at first instance. The Court of Appeal dissolved that injunction and in its place made an order for the interim preservation of property under O. 29 r. 2 which is in *pari materia* with RHC O. 29 r. 2. Counsel cited to us the following passage in the judgment of Scott LJ, which he said concluded the point in his client's favour in the present instance:

> The Central Bank should be required, first, to earmark the £8.9m. in a separate account and, second, should be restrained from dealing with the earmarked fund otherwise than in the normal course of business and unless and to the extent that there are no other funds in England available to be used. The Central Bank should be required to inform PPI's solicitors in advance of any use proposed to be made of the £8.9m and, at the same time, to give details of all foreign currency reserves for the time being held in this country. Save as aforesaid I would allow the appeal and discharge the Mareva injunction.

Counsel says that if an "earmarking order" could be made in *Polly Peck,* there was no reason why this court could not make a similar order here. He puts his case in this way. Polly Peck had no judgment in its favour. Yet it was entitled to an earmarking order. Here, his client, the plaintiff, has a judgment and is therefore in a much stronger position than Polly Peck. It is therefore entitled to have an earmarking order of up to a limit of RM100 million. With respect, I am unable to agree. The facts of *Polly Peck* and this case are far apart. In *Polly Peck*, the plaintiff was the beneficial owner of the monies diverted by the first defendant, Nadir. Therefore it had a right in equity to trace the whole or any part of it into the hands of a third party; in that case the Central Bank. See, *Banque Belge v. Hambrouck* [1921] 1 KB 321; *Foskett v. McKeown* [2000] 3 All ER 97. Once the money was found, Polly Peck as the true owner could compel the earmarking of part of its money that had come into the Central Bank's hands. But that is not the case here. The relationship between the plaintiff and defendant is one of creditor and debtor. It is not that of fiduciary and beneficiary. Whatever monies the defendant has belongs to it and not to the plaintiff. All that the plaintiff has is a judgment which it may execute at the appropriate time. Accordingly, *Polly Peck* does not assist the plaintiff.

That said, it is clear from the affidavits filed on the motion before us, without prejudging the merits of the appeal, that the facts cry out for interim protection of the plaintiff's accrued rights. Serious allegations of fact have been made in the plaintiff's affidavit in support of its motion. The defendant has merely denied some of these allegations in general terms. But it has not been forthcoming with facts that are peculiarly within its knowledge. In short, there has been a singular lack of candour. Reading the affidavits leaves one with the clear impression that the plaintiff requires interim protection until this court hands down its judgment. That being the case we made the order referred to earlier in this judgment.

Our order merely restrains the defendant from disposing or dissipating its assets up to RM100 million. This is merely in the form of a post judgment Mareva injunction that provides the plaintiff the much needed interim protection until further order. In my judgment, s. 44 amply empowers us to make the order we made. The interests of justice demand it. We also ordered that the costs of the motion abide by the event of the appeal. After we had granted the injunction, counsel for the defendant moved for a stay of our order. That application was refused.

A My learned brother Zulkefli bin Ahmad Makinudin, JCA has seen this judgment in draft and has expressed his agreement with it.

James Foong JCA:

I have read the draft judgment of my learned brother, Justice
B Gopal Sri Ram. Though we both agreed to the conclusion arrived at and the material part of the contents therein, I am not in favour of the approach adopted in respect of how the Court of Appeal's jurisdiction is secured in dealing with this application of the appellant before us.

C By the scare doctrine of *'staris decisis'* the common law in this country has developed much in line with that inherited from the mother of common law – England. This means that the *ratio decidendi* from a judgment or decision of a more superior court is
D binding on all later courts under the system of judicial precedent. This is trite law.

I therefore feel that the Federal Court's decision in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769 and *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 CLJ 1,
E in declaring that the Court of Appeal has no original jurisdiction, save and except, in the limited scope granted under s. 44 of the Courts of Judicature Act to deal with "any proceedings pending before the Court of Appeal" is binding on this court. The dissenting view of Chong Siew Fai (CJ Sabah & Sarawak) in *Lam*
F *Kong Co Ltd v. Thong Guan Co Pte Ltd (supra)* over this point cannot be accepted as the correct state of taw over the majority judgment of two other Federal Court Judges who sat on that case.

G In this instant case, I am of the view that since there is a pending proceeding before this court where the decision in the appeal proper has yet to be delivered, though the appeal was argued, this court is clothe with jurisdiction to hear this notice of motion brought by the appellant for our consideration.

H By this provision, I approached this motion and arrived at the conclusion which is similar to those of my other two brother judges in ordering the defendant be restrained from disposing or dissipating its assets up to RM100 million.

I